COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

In the matter of:	)	
	)	D.T.E. 99-91-A
Massachusetts Municipal Wholesale Electric Company	)	

REPLY BRIEF OF READING MUNICIPAL LIGHT DEPARTMENT

INTRODUCTION

Pursuant to the procedural schedule issued in this reopened proceeding, Reading Municipal Light Department ("RMLD") hereby files its brief in response to the initial brief of the Massachusetts Municipal Electric Wholesale Company's ("MMWEC") filed on July 27, 2001. As set forth below, nothing in MMWEC's Initial Brief supports its request to change the Department of Telecommunications and Energy's ("Department" or "DTE") March 24, 2000 Order ("Order") to eliminate the condition requiring the Department's review of the MMWEC Amended and Restated General Bond Resolution ("Amended GBR") prior to the issuance of the bonds.

ARGUMENT

I. MMWEC's Request to Eliminate Prior Review of the Amended GBR is a Substantive Change to the Department's Order, Which Cannot Be Treated Summarily.

A. MMWEC's Relentless Insistence that its Request Seeks Only Technical, Non-substantive Changes is a Blatant Attempt to Avoid Department Review of the Final, Amended GBR.

In its Order the Department clearly and unambiguously Ordered MMWEC to file the final Amended GBR for its review prior to issuing bonds. More than a year after that Order was issued, MMWEC sought to eliminate this essential part of the Order, by claiming it was asking the Department to make a "technical" change. In the Department's July 13, 2001 Ruling Reopening the Record Pursuant to 220 C.M.R. 1.11(8) ("*Ruling*") at 3, the Department completely rejected MMWEC's blatant attempt to fundamentally change this crucial element of the Department's review process as part of a technical correction. Specifically, the Department ruled, "While MMWEC characterizes its letter as a request for "technical corrections," its request goes far beyond the scope of technical corrections and, instead, seeks substantive amendments to the Department's Order." Ruling at 3. Undeterred by a second, clear and unambiguous statement from the Department, MMWEC continues to press its wholly unsupportable position that it is seeking only a technical change. Initial Brief of MMWEC at 1-2 (characterizing request as request for correction and clarification). This argument is moot and should be rejected.

MMWEC's continuing efforts to circumvent the Department's scrutiny itself raises significant concerns as to what changes could be inserted into the Amended GBR between now and the issuance of the bonds. For all of the reasons set forth in RMLD's Initial Brief and in this Reply Brief, there is no reason the Department should eliminate its prior review of the Amended GBR. The Department should

require MMWEC to submit the final Amended GBR[1] for its review prior to issuing the refunding bonds.[2]

B. RMLD Has Demonstrated that MMWEC's Request to Eliminate the Department's Prior Review of the Amended GBR is a Substantive Change.

As noted above, MMWEC is seeking not a technical but a significant substantive change to the Department's Order. The GBR plays a paramount and crucial role in how the MMWEC bonds are issued and how the bond funds are used.[3] See MMWEC Response to DTE RR-2 (February 2, 2000) (discussing relationship between GBR and refunding and restructuring of debt). The Amended GBR is the very essence of MMWEC's petition. Even MMWEC has admitted, "[t]he purpose of MMWEC's refunding Petition is to amend and restate its GBR." See MMWEC Response to RMLD Request No. 10(b) (January 14, 2000). Without the Amended GBR MMWEC cannot go forward with the refinancing.

Given the fundamental importance of the Amended GBR to MMWEC and the financing of MMWEC's power supply projects, there cannot be, and there is not, any comparison between what MMWEC is asking the Department to approve in this proceeding and a typical MMWEC bond issuance. This is the first time the GBR has been amended. Indeed, even MMWEC recognizes that this

[1] This is the final Amended GBR in terms that no further changes which are not directed by the Department can be made.

[2] MMWEC basically concurred with this concept in its response to DTE RR-4. However, this proposed solution is notably absent from MMWEC's Initial Brief.

[3] The GBR governs, among other things, the: (1) sale, lease and disposal of the properties of any Project; (2) investment of MMWEC funds; (3) determination of whether or not a series of bonds will have debt service reserve and the required balance for that reserve; (4) funding of any reserve with a surety bond, insurance policy or letter of credit; (5) use of proceeds to acquire property or purchase replacement electric capacity and energy; and (6) amendments to Power Sales Agreements. Prefiled Testimony of Wesolowski, at pp. 12, 14-16; see also MMWEC's Response to RMLD Request No. 2, 3, 4, 5 (January 14, 2000). In addition, the GBR is referenced in the Power Sales Agreements between MMWEC and the Project Participants, which MMWEC has unsuccessfully attempted to use to impose significant increases in charges to Project Participants. Therefore, the GBR will impact MMWEC, MMWEC's Bond Fund Trustee, MMWEC's bondholders and Project Participants, such as RMLD.

is not a typical, routine refinancing. See id. Since MMWEC is seeking a fundamental change to its most important financial arrangement, MMWEC cannot seriously argue, as it has tried to do in its initial brief, that the Department should rely on the "standard practice" for reviewing MMWEC's bond issuances. What MMWEC is seeking is much more than what is a stake in a typical bond issuance or refinancing. The Department is right to insist on reviewing the Amended GBR prior to the bond issuance. MMWEC's request to eliminate this prior review clearly constitutes a significant change to a substantive and important condition of the Order and should be rejected.

C. MMWEC Does Not Provide Any Controlling Legal Precedent for Making this Type of Substantive Change to the Department's Order.

In its brief, MMWEC provides no relevant legal support for making this type of substantive change to the Department's Order. MMWEC relies on the Department's Order in Massachusetts Municipal Wholesale Electric Company, D.P.U. 584-A, Supplemental Order (June 5, 1981) for the proposition that the Department has the authority to make the requested changes. MMWEC's reliance on this case, however, is misplaced. That Order concerns an issue of clarification, i.e., interest calculation, which clearly does not apply here. It has absolutely nothing to do with making substantive changes. Under the Department's standard of review, clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is so ambiguous as to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-8 at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A at 3 (1992), citing Fitchburg Gas &

Electric Light Company, D.P.U.18296/18297, at 2 (1976). The Department has specifically ruled that MMWEC failed to meet this standard clarification in this case. See Department *Ruling*, at 3.

For this reason, the cases relied on by MMWEC in its Initial Brief at page 3, note 1 are inapposite because those cases involve procedural matters, whereas here, the Department ruled that MMWEC's requested change to the ordering clauses involves substantive issues.

Moreover, the fact that the Department may have conditioned approval of the submission of documents without prior review in other cases is not persuasive in this case where MMWEC is seeking a fundamental change to its basic financial document. MMWEC's reliance on Massachusetts Municipal Wholesale Electric Company, D.P.U. 86-57 (April 29, 1987), to support its request for no prior review is without merit. That case involved an uncontested financing petition. See D.P.U. 86-57, at 7. There were no "issues" of the magnitude presented in this proceeding. Thus, in that case it was entirely appropriate for the Department to condition approval on the submission of certain documents without requiring prior review. See Section III, infra (discussing Department's authority to impose *reasonable* conditions to its approval of financing proposals). This case involves a completely new and Amended GBR. The existing GBR has been in existence for decades and has never been changed.

II. The Record Does Not Support the Elimination of the Department's Prior Review of the Amended GBR.

MMWEC's request to eliminate prior review of the Amended GBR also is not supported by the record. As set forth in RMLD's Initial Brief, the record indicates that the version of the Amended GBR submitted into evidence and which would be used for the refinancing, would remain substantially the same, allowing for some possible minor, non-substantive changes typical of any drafting process. In the initial proceeding, MMWEC reserved its rights to make "refinements" to the Amended GBR based

on comments from bond insurance companies, rating agencies, and large investors. Transcript ("Tr.") at 57. Even though MMWEC anticipated only minor changes to the Amended GBR, the Department still deemed any change important enough to warrant prior review and explicitly conditioned its approval on such prior review. There is no evidence in the record to suggest that the Department did not intend for MMWEC to submit the Amended GBR to prior review.

Not only does MMWEC seek a substantive change to the Department's Order itself, MMWEC's request does not comport with the record because MMWEC has already made more than mere "refinements" to the Amended GBR. See MMWEC's Response to DTE RR-4. The drafts of the Amended GBR provided by MMWEC indicate that substantive changes have been made to the Amended GBR since it was submitted to the Department in the initial proceedings. For instance, Article VII, Section 7.3 of the July 19, 2001 draft requires bond counsel approval. This revision to the Amended GBR is significant because it subjects Project Participants to another layer of approvals in order to buy out of projects with MMWEC.

Moreover, as discussed at pages 9 and 10 in RMLD's Initial Brief, this section of the July 19, 2001 draft reflects other substantive changes, which also are ambiguous and therefore, illustrates the need for prior Department review and a hearing on the Amended GBR issue. The underlying basis for the Amended GBR was to allow a Project Participant to buy out of a Project in order to enhance its competitive position. It is not apparent from the revised language whether a Project Participant that wants to depart from a Project can be prevented from doing so because the remaining Project Participants are unwilling to pay the pro-rata share of the ongoing Administrative and General and Operation and Maintenance costs for the Project which had been paid by the departing Project Participant. This same addition to the Amended GBR also raises the question of whether the remaining

Project Participants are obligated to pay for such costs. Therefore, MMWEC's proposed changes to the GBR are not even consistent with the record, which allows only for "refinements." Moreover, nothing in the record supports such a change to the Amended GBR, not to mention that MMWEC has not yet submitted a final draft of the Amended GBR, which means that MMWEC conceivably could make even more extensive and significant changes. For this reason, MMWEC cannot rely on the preliminary drafts of the Amended GBR submitted in response to DTE RR-4 to show that only minor changes to the Amended GBR have been or will be made.

III. MMWEC Improperly Asks the Department to Abdicate its Regulatory Oversight Responsibility in this Proceeding.

Despite the significance of MMWEC's proposal to eliminate the review process of the Amended GBR, MMWEC asks the Department simply to trust that MMWEC will not take any action that is in any manner inconsistent with the evidence in this case. Initial Brief of MMWEC, at 6. MMWEC's "don't worry – trust me" approach to regulation is ridiculous, especially given the substance of this proceeding. It is the Department's role to ensure that MMWEC complies with the Department's Order, which in this case means that the Amended GBR remains consistent with the GBR upon which the Department made its March 24, 2000 Order. This is the Department's role and obligation - not MMWEC's - as part of the regulatory process. If the Department adopted MMWEC's laissez-faire approach to review, there would be no need for the Department or for regulation of financing matters of MMWEC or any private electric or gas company.

Moreover, contrary to MMWEC's position, it is beyond question that the Department possesses ample authority to review MMWEC's financing proposal and to impose conditions. See Fitchburg Gas and Elec. Light Co. v. Department of Pub. Utils., 395 Mass. 836, 842-43 (1985);

Massachusetts Municipal Wholesale Electric Company, D.P.U. 1627 (Phase I) (1985), at 9; G.L. c. 164 App. § 1-17. Pursuant to MMWEC's enabling legislation, the bond issuance shall be subject to the Department's approval "and such approval shall be subject to such reasonable terms and conditions as the department may determine to be in the public interest…" G.L. c. 164 App. § 1-17. Prior Department review of the Amended GBR is particularly important because of its significance and legal force. Clearly, the Department understood the importance of reviewing the Amended GBR by explicitly conditioning approval of MMWEC's financing petition on receipt and review of the Amended GBR.[4] Massachusetts Municipal Wholesale Electric Co., D.T.E. 99-21, at 21 (2000). Elimination of the review requirement is not an inconsequential change – as the Department already has ruled. In fact, without prior review of the Amended GBR, the Department would be powerless to take any necessary corrective action after the bonds are issued. Subjecting the final draft of the Amended GBR to the Department's prior review, as outlined in RMLD's Initial Brief, is certainly a reasonable condition, given the significance of the Amended GBR. Also, MMWEC's schedule presented in response to DTE RR-2 can accommodate a meaningful review, including a hearing on this matter.[5]

MMWEC also attempts to convince the Department that because MMWEC is a public corporation, it is entitled to deferential treatment. No such special treatment is warranted in this case. Notably, the Supreme Judicial Court ruled that the Department has the same authority to review MMWEC's financing proposals as it does to review financing matters of investor-owned utilities.[6] See Fitchburg Gas and Elec. Light Co., 395 Mass. at 842. Further, MMWEC is not entitled to any

[4] The Department's condition in this case is not unique. Conditions of prior review routinely are imposed in other cases, such as requiring compliance filings in rate cases before the rates go into effect.
[5] MMWEC's schedule apparently could accommodate review, including a hearing on not only the final draft but the final Amended GBR. See MMWEC Response to DTE RR-2.

deference to its "management judgment" in this case because amending the GBR is an extraordinary event.

> Where extraordinary circumstances raise serious questions regarding the efficacy of the purpose of the financing or the adequacy of management's decision-making process, however, the Department's level of review must be more detailed. Specifically, such a review must be undertaken when the extraordinary circumstances have the potential to bring about a substantial adverse impact on the public interest.

D.P.U. 1627 (Phase I), supra, at 11-12 (citations omitted); see also Massachusetts Municipal Wholesale Electric Company, D.P.U. 86-38, at 10 (1987).

As set forth in Section I(B) above and in RMLD's Initial Brief, the GBR has never been changed and it is probably the most significant piece of evidence in this proceeding. The GBR is integrally related to MMWEC's financing proposal and it is the GBR that defines the rights of RMLD and other Project Participants and MMWEC members. The Amended GBR undeniably has the *potential* to bring about a substantial adverse impact on the public interest. See id.

Accordingly, contrary to MMWEC's insistence, MMWEC's request to eliminate the Department's prior review of the Amended GBR is not limited to "a perfunctory review."[7] See Fitchburg Gas and Elec. Light Co., 395 Mass. at 842. The Department, therefore, is empowered to and must review the final draft of the Amended GBR to ensure that MMWEC's financing proposal meets the public interest standard required by G.L. c. 164 App. § 1-17 and Supreme Judicial Court and Department precedent. See, e.g., id. at 843-44. The Department cannot abdicate its oversight responsibility.

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[6] This SJC decision was issued approximately four years after the Department's Order in D.P.U. 20248, on which MMWEC relies to support its position.

[7] Moreover, the Department does not accord MMWEC deference to its management decisions when there is the "potential to bring about a substantial adverse impact on the public interest." See Massachusetts Municipal

IV. RMLD Did Not Object to the Department's Order Because the Order Clearly Required the Department's Prior Review of the Amended GBR.

MMWEC argues that the fact that RMLD did not raise timing concerns at the initial proceeding or object to the Department's Order shows that RMLD did not rely on the condition requiring prior Department review. See Initial Brief of MMWEC, at 7. This argument is simply specious. RMLD did not raise concerns with the Department's Order or the timing of the submission of the Amended GBR because the Department's Order satisfied RMLD's concerns – it plainly and unequivocally subjected the Amended GBR to prior Department review before the bonds were issued so as to ensure that RMLD's interests would be protected. It would have been totally illogical for RMLD to object to a portion of the Order with which it agreed.

The Order is clear and unequivocal. MMWEC has never identified any language in the ordering clauses that is "so ambiguous as to leave doubt as to its meaning." See Boston Edison Company, D.P.U. 92-1A-8 at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2. The wording of the Department's orders creates absolutely no confusion as to the timing of the submission of the Amended GBR or the Department's interest in reviewing that document once submitted. Had MMWEC been able to show such an ambiguity and that the requested changes were not significant, the Department could have dealt with MMWEC's proposed changes in a request for clarification. The Department, however, refused to do so and ruled that MMWEC's request requires that the record be reopened.

Also, MMWEC's speculation as to what RMLD might have done had the Department not included the condition requiring prior review of the Amended GBR is absurd. Moreover, it is utterly

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Wholesale Co., DPU 86-38, at 10 (1987). For the reasons stated in this brief and RMLD's Initial Brief, the Amended

perplexing as to how MMWEC arrives at the conclusion that RMLD did not rely on this condition. If anything, MMWEC – the party that was dissatisfied with the condition -- should have objected at the time of the issuance of the Order and not wait more than one year to raise the issue.

Nonetheless, RMLD can show harm if the Department grants MMWEC's request at this stage. MMWEC's submission of the drafts of the Amended GBR reflects substantive changes that may impact RMLD's rights as a Project Participant and an intervenor in this proceeding. At this point, RMLD cannot even determine with any certainty the extent of the impact of MMWEC's changes to the Amended GBR because, as discussed above and in RMLD's Initial Brief, the Amended GBR leaves several questions unanswered and the Amended GBR provided by MMWEC is still only a preliminary version. The final version could well contain additional revisions that significantly and adversely impact RMLD. If the Department eliminates the condition requiring prior review of the Amended GBR, it would be powerless to take any necessary corrective action after the bonds are issued.

GBR has the potential to substantially impact the public interest and RMLD's interests.

CONCLUSION

For the foregoing reasons, the Department should reject MMWEC's request to eliminate the Department's prior review of the Amended GBR. RMLD also respectfully continues to request additional discovery and a hearing on the issues raised in the Department's Ruling concerning the Amended GBR.

READING MUNICIPAL LIGHT DEPARTMENT,

By its attorneys,

Kenneth M. Barna
Wayne R. Frigard
Karla J. Doukas
Rubin and Rudman LLP
50 Rowes Wharf
Boston, MA 02110
617/330-7000

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